BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA L. KING	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,292
DJ ENGINEERING, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 20, 2007 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded additional follow-up medical treatment with Pat D. Do, M.D., on an as-needed basis.

Claimant appeared by her attorney, David M. Bryan of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John R. Emerson of Kansas City, Kansas.

The Board adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the Preliminary Hearing transcript of June 19, 2007, with attachments; and the documents of record filed in this matter.

ISSUES

Respondent raises the following issues in its Application For Review:

1. That the Administrative Law Judge exceeded her jurisdiction by appointing Dr. Pat Do as the court ordered authorized physician. The only medical evidence presented at hearing was a report signed by Dr. Pat Do declaring that the claimant had reached maximum medical improvement.

2. That the claimant is not in need of additional medical treatment as she is at maximum medical improvement for her workers compensation injury.[1]

Claimant argues both of the above listed issues are non-jurisdictional issues on appeal from a preliminary hearing order. However, in its brief to the Board, respondent also argues that the ALJ exceeded her jurisdiction in ordering the additional medical treatment because claimant's need for additional medical treatment stems from her new, most recent employments with U.S.D. 490, Rubbermaid and the El Dorado Correctional Facility.

The following issue was also raised for the Board's consideration:

Is claimant's current need for medical treatment related to her work injury which arose out of and in the course of her employment with respondent, or is it related to her more recent employments with U.S.D. 490, Rubbermaid and the El Dorado Correctional Facility?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was injured while working for respondent on August 14, 2006, when she fell over a stack of parts, injuring her right ankle. Claimant was referred to Tracy M. Baker, M.D., for treatment. After a period of conservative care, claimant was released to light duty. By September 27, 2006, claimant was reporting to Dr. Baker that the pain was "much better" and the numbness and tingling in the ankle were gone. Claimant again developed problems with her ankle, returning to Dr. Baker on December 6, 2006. Dr. Baker referred her to Dr. Do, who saw claimant on December 14, 2006. Dr. Do initially recommended physical therapy, which was refused by respondent. However, claimant still attended physical therapy and reported a significant reduction in her pain level.

While claimant was receiving treatment, she was terminated by respondent on November 30, 3006, with no reason given. Claimant thereafter obtained several jobs. The first was with U.S.D. 490, then with Rubbermaid, and then with the El Dorado Correctional Facility.

Claimant was released by Dr. Do on March 1, 2007, with no restrictions and at maximum medical improvement (MMI). Claimant testified that the first time she was seen

[1] Respondent's Application For Review at 1.

by the physical therapist, she was told that she walked improperly. She was told that she was walking to adjust for the pain in her ankle. Claimant testified that after her release by Dr. Do, the walking began to affect her ankle again, and also began to hurt her right knee and hip. Claimant testified that the work she performed for the school district and the correctional facility did not bother her ankle.

This matter went to preliminary hearing on June 19, 2007, with claimant requesting additional medical treatment with Dr. Do as the authorized treating physician. Respondent argues that claimant's current need for medical treatment is related to her recent employments with U.S.D. 490, Rubbermaid and/or the El Dorado Correctional Facility. Respondent further argues that the ALJ exceeded her jurisdiction by appointing Dr. Do to provide additional medical treatment to claimant.

PRINCIPLES OF LAW AND ANALYSIS

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[2]

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

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[2] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2006 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[7]

However, the Kansas Supreme Court, in *Stockman,*[8] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[9]

Claimant's assessment of respondent's listed issues is correct. Neither of the issues identified in respondent's Application For Review confers jurisdiction on the Board on an appeal from a preliminary hearing. The ALJ is authorized by K.S.A. 44-534a to award ongoing medical treatment at a preliminary hearing. Thus, those issues would be non-jurisdictional on appeal from a preliminary hearing. However, in its brief to the Board, respondent also argues that claimant's need for medical treatment arises from claimant's current or recent employment, and not from her injuries suffered with respondent. Respondent disputes whether claimant's current problems arise out of and in the course of her employment with respondent or whether claimant has suffered an intervening injury at one or all of her new employments. That is an issue over which the Board does take jurisdiction on appeal from a preliminary hearing appeal.

The only testimony in this record regarding the effect claimant's recent jobs have had on her ankle, knee and back comes from claimant. And claimant has testified that her current jobs have not affected her injuries. The only problem claimant is currently experiencing comes from the everyday activity of walking.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The first two issues raised by respondent in its appeal are not issues over which the Board takes jurisdiction on appeal from a preliminary hearing Order. Therefore, respondent's appeal on those issues is dismissed.

As for the third issue, this Board Member finds that claimant's current job with the El Dorado Correctional Facility and the earlier jobs with U.S.D. 490 and Rubbermaid did

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[9] K.S.A. 44-534a(a)(2).

[10] K.S.A. 44-534a.

not aggravate her ankle injury. Claimant's testimony that she did very little walking on those jobs and her testimony that the jobs caused her no difficulties are uncontradicted in this record. Without some evidence that those new jobs are causing some sort of aggravation of that ankle condition or are causing the knee and hip pain, the liability for claimant's ongoing problems remains with respondent. This Board Member finds that claimant's current need for medical treatment stems from her original injury suffered while working for respondent. Therefore, the Order of the ALJ should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 20, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

c: David M. Bryan, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge